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Supreme Court, U.S.
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No. 03-1235

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

ANTHONY CHARLES DAVIS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY 1

CONCLUSION 8

TABLE OF AUTHORITIES

CASES — PAGE

Coker v. Georgia, 433 U.S. 584 (1977) 6
Ewing v. California, 538 U.S. 11 (2003) 2, 3, 7
Harmelin v. Michigan, 501 U.S. 957 (1991) 2, 3, 6
Hutto v. Davis, 454 U.S. 370 (1982) 7
Michigan v. Long, 463 U.S. 1032 (1983) 1, 2, 5
Rummel v. Estelle, 445 U.S. 263 (1980) 6
Solem v. Helm, 463 U.S. 277 (1983) 2, 7
State v. Bartlett (I), 792 P.2d 692 (1990) 3, 4
State v. Bartlett (II), 830 P.2d 823 (1992) 3
State v. DePiano, 926 P.2d 494 (1996) 3, 4
Three Affiliated Tribes of Fort Berthold Reservation
v. Wold Eng 'g, P.C., 467 U.S. 138 (1984) 5
Zacchini v. Scripps-Howard Broadcasting Company,
433 U.S. 562 (1977) 5

STATUTES

A.R.S. § 13–603.01 7
A.R.S. § 13–4037(B) 3-5
28 U.S.C. § 1257(a) 1

ARGUMENTS IN REPLY

I

THE ARIZONA SUPREME COURT REVERSED DAVIS'S SENTENCES BASED ON ITS ANALYSIS OF THE EIGHTH AMENDMENT, NOT ON ANY INDEPENDENT AND ADEQUATE STATE LAW GROUND.

Davis contends that this Court does not have jurisdiction to review the Arizona Supreme Court's decision because it was not based on federal constitutional law, but on Arizona statutory law that allows the supreme court to review and to reduce sentences as if it found them unconstitutional. Davis is incorrect in stating that the Arizona Supreme Court did not base its decision on federal constitutional law, and that the state court had authority under state law to void Davis's sentences and order him resentenced.

This Court has certiorari jurisdiction to review a final judgment of a state's highest court when the judgment is based on federal statutory or constitutional law. 28 U.S.C. § 1257(a). When a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and no independent and adequate state ground for the decision is clear from the decision's face, this Court will presume that the decision is based on federal law. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). This Court has jurisdiction to review the Arizona Supreme Court's decision in this case because the majority of the supreme court incorrectly ruled that Davis's sentences violated the Eighth Amendment.

The Arizona Supreme Court's majority decision pellucidly demonstrates in its first two sentences that it "fairly appears to rest primarily on federal law":

> We granted review in this case to decide whether sentencing a twenty-year-old defendant to a mandatory minimum sentence of fifty-two years without the possibility of parole for having

> voluntary sex with two post-pubescent teenage girls is so grossly disproportionate to the crime as to violate *the Eighth Amendment's prohibition against cruel and unusual punishment.* We hold that it is.

(Pet. App. A at A–1, ¶ 1; emphasis added.) The majority could not have stated any more clearly that it was deciding an issue of federal constitutional law. When the majority began its analysis of Davis's claim, it again articulated the federal issue:

> Davis argues that given the circumstances of his offenses, the four flat, consecutive, thirteen-year sentences violate *the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution* and Article 2, Section 15 of the Arizona Constitution. He contends that the mandatory fifty-two year sentence, without the possibility of parole, is so grossly disproportionate to his offenses as to be unconstitutional.

(*Id.* at A–4, ¶ 11; emphasis added.)

The majority ruled that it had no reason to interpret Arizona's "cruel and unusual punishment" provision differently from the Eighth Amendment. (*Id.* at A–4, ¶ 12.) It then proceeded to discuss this Court's controlling Eighth Amendment jurisprudence, primarily this Court's decisions in *Ewing v. California*, 538 U.S. 11 (2003), *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Solem v. Helm*, 463 U.S. 277 (1983). (Pet. App. A at A–4 to A–10, ¶¶ 12–32.) Nothing in the majority's decision indicates that it cited these cases merely as persuasive, and not binding, authority on a matter of state law. *See Long*, 463 U.S. at 1041 (state court may cite federal precedents merely for guidance on state law question, but court must make a "plain statement" to that effect.)

After analyzing this Court's Eighth Amendment decisions and finding that Davis's mandatory sentences under the Dangerous Crimes Against Children Act were "grossly disproportionate" to his crimes, the

majority found that the sentences "create[d] an unconstitutionally disproportionate punishment in light of the specific facts and circumstances of Davis's offenses." (Pet. App. A at A–19, ¶ 48.) The majority did so because it "recognize[d] that the Supreme Court has construed the *Eighth Amendment* to impose on a reviewing court the duty to examine a sentence claimed to be cruel and unusual in light of the specific facts and circumstances under which it is imposed." (*Id.* at A–20, ¶ 49; emphasis added.) Because the Arizona Supreme Court decided Davis's case under the Eighth Amendment, this Court has jurisdiction to review its decision.

The majority did, of course, discuss state law—primarily its own conflicting decisions interpreting the Eighth Amendment: *State v. Bartlett (I)*, 792 P.2d 692 (1990), *rev'd*, 501 U.S. 1246 (1991), *State v. Bartlett (II)*, 830 P.2d 823 (1992), and *State v. DePiano*, 926 P.2d 494 (1996). (Pet. App. A at A–4 to A–11, ¶¶ 13–32.) It did so, however, only to explain that it believed that this Court's holding in *Ewing* had ended the Arizona Supreme Court's internal debate about whether *Harmelin* required an examination of the facts and circumstances of a defendant's crime in an Eighth Amendment analysis. (Pet. App. A, at A–4 to A–11, ¶¶ 13–32.) It did not use its own decisions as an independent basis for its holding.

Despite the clear statements in the decision that the majority resolved his claim under the Eighth Amendment, Davis maintains in his Brief in Opposition that the majority resolved the claim under a state statute, Arizona Revised Statutes ("A.R.S.") Section 13–4037(B), because the majority noted that this statute allowed an appellate court to review the excessiveness of his sentences. (Brief in Opposition, at 6–10.) Although the majority cited section 13–4037(B) twice in its opinion, it did so only as additional authority for considering the facts and circumstances of Davis's crimes in its Eighth Amendment analysis. (*See* Pet. App. A at A–11, ¶ 33 ["Although Davis's sentences fell within the legal sentencing range, if we find a sentence excessive, A.R.S. § 13–4037(B) imposes on us the duty to review the circumstances of the case to determine whether the sentence imposed is in fact unwarranted."]; *id.* at A–13 to A–14, ¶ 37 ["The broad range

of offenses encompassed by the statute under which Davis was charged, coupled with the legislature's command in A.R.S. § 13–4037(B) and the Supreme Court's Eighth Amendment jurisprudence, impose on us a duty to apply the law to the specific facts of the cases that come before us to determine the constitutionality of the sentences imposed."].)

The majority did not rely on section 13–4037(B) as authority to overturn Davis's sentences because it could not. Section 13–4037(B) provides as follows:

> Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken.

This statute allows a state appellate court to *reduce* the sentence imposed to *any legal sentence* if it believes that the sentence imposed is excessive. The Arizona Supreme Court has interpreted this statute to mean that it is "limited to reducing an excessive sentence to one within the statutory range enacted by the legislature, assuming that range is constitutional." *Bartlett (I)*, 792 P.2d at 704; *see also DePiano*, 926 P.2d at 499. Thus, it cannot be used to void a sentence as unconstitutional. *DePiano*, 926 P.2d at 499. If a sentence is unconstitutionally cruel and unusual, section 13–4037(B) is inapplicable. *See Bartlett (I)*, 792 P.2d at 704.

Section 13–4037(B) provides no basis for the majority's ruling. The majority could not use the section to reduce Davis's sentences, because the trial court had already imposed the minimum sentences possible. For this reason, and because the majority found Davis's sentences to be "grossly disproportionate" under the Eighth Amendment, section

13–4037(B) had no effect on the court's disposition of the case. The majority's decision, therefore, rested not only "primarily" but solely on the question of federal constitutional law, and section 13–4037(B) was not an independent and adequate state law ground for it.[1]

II

DAVIS IMPLICITLY CONCEDES THAT THE MAJORITY IMPROPERLY CONSIDERED THE MANDATORY AND CONSECUTIVE NATURE OF HIS SENTENCES IN FINDING THAT THE SENTENCES VIOLATED THE EIGHTH AMENDMENT.

The first question for review in the State's petition for writ of certiorari was whether an appellate court could consider the mandatory and consecutive nature of sentences imposed for multiple offenses committed on separate occasions in determining whether the sentences violated the Eighth Amendment. (Petition for Writ of Certiorari, at i.) The State presented authority from this Court and other courts holding that an appellate court *cannot* consider the mandatory and consecutive nature of sentences in making this determination. (*Id.* at 9–14.) In his Brief in Opposition to the Petition, Davis does not argue that the majority could have properly considered the mandatory and consecutive nature of his sentences. (Brief in Opposition, at 6.) He apparently does not take issue with the State's contention on this point. Because Davis

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1. Even if Davis were correct that the majority relied on section 13–4037(B) for its decision to invalidate his sentences, this Court would still retain jurisdiction over this case because the majority's decision would remain "interwoven" with this Court's Eighth Amendment jurisprudence. *See Long*, 463 U.S. at 1041. "[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). If a state court bases its decision of state law on an erroneous interpretation of federal law, this Court "ha[s] jurisdiction and should decide the federal issue." *Zacchini v. Scripps-Howard Broad. Co*, 433 U.S. 562, 568 (1977). If, as Davis wishes this Court to believe, the majority used this Court's Eighth Amendment decisions as a guide for the application of section 13–4037(B), this Court should grant certiorari because the majority of the Arizona Supreme Court misunderstood and misapplied this Court's decisions in applying the state statute.

presented no contrary authority or argument, and the majority flouted this Court's precedents holding that it could not consider the mandatory and consecutive nature of his sentences in applying the Eighth Amendment, this Court should grant certiorari and reverse.

III

THE ARIZONA SUPREME COURT MAJORITY'S DECISION VIOLATES *HARMELIN V. MICHIGAN*'S HOLDING THAT AN EIGHTH AMENDMENT ANALYSIS CANNOT BE BASED ON THE SUBJECTIVE PERCEPTION OF THE JURISTS DECIDING THE CASE.

The State argued as its second reason for seeking certiorari review that the Arizona Supreme Court majority's subjective evaluation of the gravity of Davis's offense and his culpability violated *Harmelin*'s holding that the Eighth Amendment's "gross disproportionality" analysis must be based on objective factors. (Petition for Writ of Certiorari, at i, 14–23.) Davis responds that the majority *did* rely on objective factors in finding the sentences grossly disproportionate: facts or circumstances of the crimes or of his character that may be perceived by others. (Brief in Opposition, at 10.)

Davis misunderstands the meaning of objective factors in the Eighth Amendment context. Factors are not "objective" within the meaning of *Harmelin* merely because they involve generally observable facts or phenomena; they are "objective" only when their significance and value does not depend upon the subjective view of the judges or justices evaluating the Eighth Amendment claim: "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (quoted favorably in *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring)). Whether a sentence of a term of years is "grossly disproportionate" to a particular crime depends solely on the subjective view of the jurist making that determination. No "constitutional distinction" can be made "between one term of years and a shorter or longer term of years." *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). Therefore, "the excessiveness of one prison term as compared to

another is invariably a subjective determination." *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam).

The factors that the majority used in determining that Davis's sentences were "grossly disproportionate" are problematic because their significance depends upon the subjective views of the justices deciding his case. The majority found it important that (1) the children that Davis victimized "consented" to the sexual acts; (2) Davis had no adult criminal record; (3) post-pubescent children commonly have sex; (4) the record contained "evidence" that Davis's intelligence and maturity "fell far below" normal; and (5) the Dangerous Crimes Against Children Act, A.R.S. Section 13–603.01, was so broad that it improperly "swept" Davis's conduct within it. (Pet. App. A. at A–12 to A–13, ¶ 36.) The significance of these factors depends upon the idiosyncratic views, mores, and experiences of each justice evaluating Davis's Eighth Amendment claim. A different set of justices may have come to an opposite conclusion on the claim based on the same factors. Such an analysis is not principled and cannot be constitutionally condoned.

This Court should grant certiorari and rule that, to avoid an unprincipled, subjective Eighth Amendment determination, courts should apply the objective standard that this Court enunciated in *Ewing*: Did the state legislature have a "reasonable basis" for finding that its choice of sentence for a particular crime "'advance[d] the goals of [its] criminal justice system in any substantial way[?]'" 538 U.S. at 28 (quoting *Solem*, 463 U.S. at 297 n.22). Applying this standard will eliminate the subjectivity inherent in the Arizona Supreme Court majority's analysis.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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